

**REDACTED DECISION – 05-545 RTC – BY ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on OCTOBER 23, 2006 – ISSUED on APRIL 23, 2007**

SYNOPSIS

TELECOMMUNICATIONS TAX – SILENCE OF STATUTE ON SPECIFIC ISSUE – W. Va. Code § 11-13B-2(5) [1987] is silent on the issue of the year to which the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition applies.

TELECOMMUNICATIONS TAX – VALIDITY OF LEGISLATIVE RULE ADDRESSING SPECIFIC ISSUE NOT ADDRESSED BY STATUTE – The legislative rule promulgated by the State Tax Commissioner to address the issue that was not addressed by W. Va. Code § 11-13B-2(5) [1987], specifically W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), is based on a permissible construction of the statute, and in promulgating the rule, the Tax Commissioner did not act arbitrarily or capriciously.

TELECOMMUNICATIONS TAX – APPLICATION OF REASONABLE LEGISLATIVE RULE ON SPECIFIC ISSUE NOT ADDRESSED BY STATUTE – In accordance with the Tax Commissioner’s legislative rule, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition, made pursuant to W. Va. Code § 11-13B-2(5) [1987], is applicable to the succeeding calendar year.

TELECOMMUNICATIONS TAX – LEGISLATIVE RULE APPROVED BY LEGISLATURE AS PART OF OMNIBUS RULE BILL – Approval of a legislative rule in an omnibus rule bill will not necessarily result in invalidation of the legislative rule when, to do so would, as here, result in the inability of government agencies to carry out their functions, and which could also result in substantial financial chaos or financial hardship to the State, which would have to be borne by the citizens as taxpayers.

FINAL DECISION

On or about May 31, 2005, the Petitioner, filed a claim for refund of telecommunications tax. By letter dated August 15, 2005, the State Tax Commissioner’s Office (“the Commissioner” or the “Respondent”) denied the claim for refund.

Thereafter, in October, 2005, by hand delivery to the offices of this tribunal, the West Virginia Office of Tax Appeals, the Petitioner timely filed a petition for refund. W. Va. Code §§ 11-10A-8(2) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner. Thereafter, the parties entered into joint stipulations of fact and the matter was submitted on briefs.

FINDINGS OF FACT

On or about August 18, 2006, pursuant to Rule 47 of the Office of Tax Appeals' ("OTA's") Rules of Practice and Procedure, W. Va. Code St. R. § 121-1-47 (Apr. 20, 2003), the State Tax Department ("Department") and Petitioner (collectively referred to herein as the "Parties"), by their respective counsel, entered into joint stipulations of fact, as follows:

1. The Petitioner is a West Virginia corporation engaged in a telecommunications business selling or furnishing telegraph, telephone or other telecommunications service within the meaning of W. Va. Code § 11-13B-1 & -3.

2. Starting before November 2001 and throughout 2004, Petitioner continuously provided local residential and business telecommunications services throughout its incumbent local service area in the State of West Virginia.

3. Tax year 2003 is the period from January 1, 2003 to December 31, 2003.

4. Tax year 2004 is the period from January 1, 2004 to December 31, 2004.

5. Tax year 2005 is the period from January 1, 2005 to December 31, 2005.

6. Throughout tax year 2004, the Petitioner reported and paid estimated telecommunications tax to the West Virginia Department of Revenue on the revenues it received from providing local residential and business services to customers in West Virginia.

7. On December 31, 2003, the West Virginia Public Service Commission (the "PSC")

issued a Commission Order in Case No. ***** ("2003 PSC Order") in which it listed 63 separately enumerated services or commodities that it found to be subject to competition. A true and correct copy of the 2003 PSC Order is attached as Exhibit A.

8. On December 23, 2004, PSC issued a Commission Order in Case No. ***** ("2004 PSC Order") in which it listed 66 separately enumerated services or commodities that it found to be subject to competition. A true and correct copy of the 2004 PSC Order is attached as Exhibit B.

9. An "eligible telecommunications carrier" or "ETC" is designated by the PSC to provide universal service within certain specified service areas within the State of West Virginia. See 47 U.S.C. §§ 214(e) & 254; 47 C.F.R. Part 54; Recommended Decision, General Investigation Regarding Establishment of Conditions Regarding Granting of EC status to Carriers and the Establishment of Uniform Standards for Determining ETC Compliance with Applicable Federal Requirements Regarding Use of Federal USF Money Provided to Them, Case No. ***** (July 1, 2004), attached hereto as Exhibit C; Commission Order, General Investigation Regarding Establishment of Conditions Regarding Granting of EC status to Carriers and the Establishment of Uniform Standards for Determining ETC Compliance with Applicable Federal Requirements Regarding Use of Federal USF Money Provided to Them, Case No. ***** (March 4, 2005), attached hereto as Exhibit D.

10. Several ETCs operating within the Petitioner's incumbent local service area during tax year 2004. Included Corporations A, B, C, D, E, F, and G. See Recommended Decision, General Investigation Regarding Establishment of Conditions Regarding Granting of EC status to Carriers and the Establishment of Uniform Standards for Determining ETC Compliance with Applicable Federal Requirements Regarding Use of Federal USF Money Provided to Them,

Case No. **** (July 1, 2004), attached hereto as Exhibit C; Commission Order, General Investigation Regarding Establishment of Conditions Regarding Granting of EC status to Carriers and the Establishment of Uniform Standards for Determining ETC Compliance with Applicable Federal Requirements Regarding Use of Federal USF Money Provided to Them, Case No. **** (March 4, 2005), attached hereto as Exhibit D. See also Recommended Decision, Petition for Consent and Approval of Corporation A to be Designated as an Eligible Telecommunications Carrier, Case No. **** (Entered: November 14, 2001; Final: December 4, 2001), attached hereto as Exhibit E; Recommended Decision, Petition for Consent and Approval to Designate Corporation C as an Eligible Telecommunications Carrier, Case No. **** (Entered: June 8, 2004; Final: June 28, 2004), attached hereto as Exhibit F; Recommended Decision, Petition for Consent and Approval of Corporation B for Designation as an Eligible Telecommunications Carrier, Case No. **** (Entered: December 4, 2003; Final: December 24, 2003), attached hereto as Exhibit G; Recommended Decision, Petition for Consent and Approval for Corporation D to be Designated as an Eligible Telecommunications Carrier, Case No. **** (Entered: October 2, 2003; Final: October 22, 2003), attached hereto as Exhibit H; Recommended Decision, Petition of Corporation E for Consent and Approval to be Designated as an Eligible Telecommunications Carrier in two (2) West Virginia Counties Served by Petitioner, Case No. **** (Entered: May 28, 2004; Final: June 17, 2004), attached hereto as Exhibit I; Recommended Decision, Petition of Corporation F to be Designated as an Eligible Telecommunications Carrier, Case No. **** (Entered: May 29, 2003; Final: June 17, 2003), attached hereto as Exhibit J; Commission Order, Petition of Corporation G for Designation as Eligible Telecommunications Carrier for the Receipt of Support from the Federal Universal Service Program, Case No. **** (May 4, 2001), attached hereto as Exhibit K.

11. Corporation A, in particular, has been "designated an eligible telecommunications carrier, pursuant to 47 U.S.C. § 214(e), for all wire centers served by Petitioner in West Virginia, and for the three (3) study areas served by Corporation H, an RTC [rural telecommunications carrier] in West Virginia." Recommended Decision, Petition for Consent and Approval of Corporation A, to be Designated as an Eligible Telecommunications Carrier, Case No. **** (Entered: November 14, 2001; Final: December 4, 2001), attached hereto as Exhibit E.

12. On May 31, 2005, the Petitioner filed a timely telecommunications tax refund claim in the amount of \$___ with the West Virginia Department of Revenue for the overpayments of tax it made during the period of January 1, 2004 through December 30, 2004, with respect to the revenues it received for providing the local business and residential telecommunications services that the PSC had determined were subject to competition in its 2004 PSC Order.

13. The Petitioner's claim for telecommunications tax refund was denied by the State Tax Commissioner of West Virginia (the "Respondent") on August 15, 2005. See Letter of Unit Manager, Sales Tax Unit, Internal Auditing Division to Petitioner, attached to Petitioner's Petition for Refund.

14. On October 14, 2005, the Petitioner filed a timely petition for refund seeking administrative review of the denial of the refund claim by the West Virginia Office of Tax Appeals.

15. By its petition, the Petitioner seeks to recover the amount of \$___ in telecommunications taxes it overpaid for the year 2004, together with applicable interest.

DISCUSSION

The first issue is whether or not W. Va. Code § 11-13B-2 [1987] is clear and unambiguous insofar as it defines what constitutes gross income of a telephone or telecommunications carrier for a particular tax year. W. Va. Code § 11-13B-2[1987] provides the following definitions:

(5) Gross income. – The term "gross income" of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice or data communications services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers: Provided, That on and after the first day of July, one thousand nine hundred eighty-eight, the term "gross income" of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the public service commission of West Virginia to be subject to competition. On or before the thirty-first day of December of each calendar year, the public service commission of West Virginia shall submit to the tax commissioner a listing of those commodities or services which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the purposes of defining "gross income" within the meaning of this subsection.

* * * *

(9) Taxable year -- The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which tax liability is computed under this article. "Taxable year" means, in case of a return made for a fractional part of a year under the provisions of the article, or under regulations promulgated by the tax commissioner, the period for which such return is made. (Emphasis added.)

The statute is clear and unambiguous insofar as it provides that the Public Service Commission is to determine which commodities and services provided by telecommunications companies are subject to competition. The statute provides that the list of commodities and services that are determined to be subject to competition shall be a conclusive determination. As such, it is binding on both the State Tax Commissioner and the parties to the Order.

In its orders entered December 31, 2003, and December 23, 2004, the Public Service Commission provided a list of items subject to competition. See Exhibits Nos. A & B to the “Joint Stipulation.” In its orders, the Public Service Commission also identified the tax year for which the list of telecommunications services are considered competitive. For example, on December 31, 2003, the Public Service Commission issued an order setting forth the list of those telecommunications commodities and services that are subject to competition. It further provided that the list of commodities and services identified therein were subject to competition for tax year 2003. Similarly, on December 24, 2004, the Public Service Commission issued an order setting forth the list of those telecommunications commodities and services that are subject to competition. It further provided that the list of commodities and services identified therein were subject to competition for tax year 2004.¹

The Petitioner relies on the Orders of the Public Service Commission, wherein the orders entered in 2003 and 2004 state that the commodities and services were subject to competition for each of tax years 2003 and 2004, respectively. Basically the Petitioner’s argument follows the following logical steps:

- 1) The statute provides that the Public Service Commission shall make an annual determination listing those commodities and services are subject to competition;
- 2) The statute further provides that the Public Service Commission’s determination respecting commodities and services that are subject to competition is conclusive;
- 3) In its orders, the Public Service Commission stated that the list of commodities and services that were subject to competition were for the calendar year in which the orders were entered;
- 4) Because the Public Service Commission determined that the commodities and services were subject to competition for the year in which the orders were entered, its

¹ In its order issued December 31, 2003, the Public Service Commission stated, “IT IS FURTHER ORDERED that the following telecommunications services be certified as competitive telecommunications services for the 2003 tax year and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5).” In its order issued December 24, 2004, the Public Service Commission stated, “IT IS FURTHER ORDERED that the following telecommunications services are certified as competitive telecommunications services for the 2004 tax year and that a list of such services be submitted to the West Virginia Tax Commissioner pursuant to W. Va. Code § 11-13B-2(b)(5).”

determinations in this respect were conclusive with respect to those tax years for purposes of the telecommunications tax.

The State Tax Commissioner responds by arguing that nowhere in the definition of “gross income,” *supra*, is there any statement or specification as to the tax year to which the Public Service Commission’s determination respecting commodities and services subject to competition applies. He maintains that because the statute is silent as to what year the Public Service Commission’s determination applies, the statute is ambiguous.² The Tax Commissioner further contends that the ambiguity of the definition is highlighted by the fact that the Legislature provided a definition of “taxable year,” *supra*, but did not refer to the definition of “taxable year” in the definition of “gross income.” He points out that it would have been easy for the Legislature to expressly provide that the Public Service Commission’s determination would apply to a particular tax year. But, he argues, the silence of the Legislature with respect to this issue renders the statute ambiguous.

In Syl. pt. 3, in part, *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995), with respect to the issue of whether a statute is clear and unambiguous, the Supreme Court held, “The court first must ask whether the Legislature has directly spoken to the precise question at issue.” As the Supreme Court stated in *Appalachian Power*:

[T]he question whether the Legislature has spoken on a particular question involves two smaller steps. We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. As we noted in Syllabus Point 2, in part, of *Chico Dairy Company v. Human Rights Commission*, *supra*:

² In its briefs, the Petitioner repeatedly and very studiously states that the statute is “conclusive for purposes of this subsection.” See Petitioner’s Brief, pp. 1, 2 & 4. It argues that this makes the Public Service Commission’s order conclusive for everything that is set out in its Order, including the year to which the Commission’s determination is applicable. However, that is not what the statute says. The statute says, “Such listing shall constitute a conclusive determination for the purposes of defining ‘gross income’ within the meaning of this subsection.” Thus, the Commission’s authority is limited to determining those items that are subject to competition, thus establishing whether or not they are subject to the telecommunications tax. With respect to the year to which the Public Service Commission’s determination applies, the statute is silent.

"Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and Regulations that it has in the statute.' [Cite omitted.]"

If no such readily apparent meaning springs from the statute's text, we next examine, albeit skeptically, other extrinsic sources, such as the legislative history, in search of an unmistakable expression of legislative intent. "When a statute's language is ambiguous, a court often must venture into extratextual territory in order to distill an appropriate construction. Absent explicatory legislative history for an ambiguous statute . . ., this Court is obligated to consider the . . . overarching design of the statute." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 777, 461 S.E.2d at 523. And if, at that stage, the statute itself, viewed in connection with the statutory design and the legislative history, reveals an unequivocal answer to the interpretive question, the Court's inquiry ends.

Id. at 587, 466 S.E.2d 438.

A review of the statute discloses that "the Legislature [did not] directly [speak] to the precise question at issue." The text of the statute, given its plain meaning, does not speak to whether an order of the Public Service Commission applies to the calendar year in which it enters its Order, or to the calendar year following the date on which it enters its Order. The statutory language merely authorizes the Public Service Commission to list those commodities and services that are subject to competition, to do so by a specified date, and makes its listing conclusive for the purposes of defining "gross income."³ There is no language by which the Legislature expressly states the year to which the Public Service Commission's determination applies.

³ The language in the statute making the Public Service Commission's determination conclusive refers only to whether goods and services are subject to competition. This serves the purpose of preventing the State Tax Commissioner from looking behind this determination of the Commission, because it is within the particular expertise of the Commission, and not within the particular expertise of the State Tax Commissioner.

The Petitioner argues that the term “conclusive” in the statute makes the Public Service Commission’s determination binding with respect to all matters addressed in the Order, including the year to which its Order is deemed applicable. However, no language in the statute, either express or implied, supports this proposition. Instead, the Public Service Commission is limited to determining the status of commodities and services on a particular date, the date of its determination. The statute does not make the Public Service Commission’s determination applicable to a particular tax year, nor does it make the Commission’s determination conclusive with respect to any other issue. The language of the statute does not answer the precise legal question presented.

The next step is to determine whether there is some other extrinsic source, such as legislative history, that constitutes an unmistakable expression of legislative intent. Neither party points to any extrinsic source that sheds light on this issue. This Office is not aware of any such source. Thus, this Office must conclude that W. Va. Code § 11-13B-2(5) [1987] is subject to interpretation because it does not address the issue of the tax year to which the Public Service Commission’s determination applies. This determination must be made by the appropriate administrative agency. That determination is one that is more within the particular expertise of the State Tax Commissioner than the Public Service Commission.

Since the first part of the analysis adopted by the West Virginia Supreme Court in *Appalachian Power* does not disclose an unmistakably clear expression of legislative intent, it is necessary to examine the State Tax Commissioner’s interpretation, embodied in the legislative rule, to see how it relates to the statute. This examination involves a high degree of respect for the agency’s role and, like the Supreme Court in *Appalachian Power*, this Office must give

considerable deference to the Tax Commissioner's legislative rule. *Id.* at 587-88, 466 S.E.2d 438-39.

As the Supreme Court held in Syl. pt. 4, *Appalachian Power*:

If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

In the present action, the statute is silent with respect to the issue of the year to which the Public Service Commission's Order applies.⁴ The Tax Commissioner has addressed the silence of the statute by promulgating a legislative rule the unanswered question. According to the State Tax Commissioner he promulgated a legislative rule which establishes the taxable years to which the Public Service Commission's orders apply, because the statute is ambiguous with respect to this issue. The legislative rule promulgated by the State Tax Commissioner, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), provides:

2.6. Gross income. The term "gross income" of a telephone company or communications carrier shall be defined as all gross income received from the provision of local exchange or long distance voice or data communication services but shall not include gross income from the provision of network access, billing or similar services provided to end users, other telephone companies, or communications carriers. On or after July 1, 1988, the term "gross income" of a telephone company or communications carrier shall not include gross income from the provision of commodities or services which shall be determined by the Public Service Commission of West Virginia to be subject to competition. The Public Service Commission of West Virginia will submit to the Tax Commissioner, on or before December 31 of each calendar year, a listing of those commodities or services the trading in which it has determined to be subject to competition. Such listing shall constitute a conclusive determination for the

⁴ It may not be said that the statute is ambiguous in its entirety. The statute is silent with respect to the issue presented. It simply does not address the issue which is the subject of the dispute between the parties.

purpose of defining "gross income" of a telephone company or communications carrier for the next succeeding calendar year. (Emphasis added.)

The rule promulgated by the Tax Commissioner provides that the determination of the Public Service Commission is to be prospective; that is, it is to apply to the following tax year. Stated differently, it is not to be applied retrospectively to the tax year in which it is issued. A review of the legislative rule promulgated by the State Tax Commissioner shows that it is certainly not arbitrary or capricious.

There is logic that supports the Petitioner's position. The Public Service Commission issues its Order late in the calendar year. Presumably, its determination is based on facts existing at the time that it issues its determination.⁵ Since the facts existed during the calendar year, and since it is not a certainty that the same facts will exist in the succeeding calendar year, it would not defy logic to apply the Commission's determination to the calendar year in which the determined facts were certainly in existence. Thus, there is logic to support the Petitioner's position. It is not unfounded.

On the other hand, there is also logic to support the State Tax Commissioner's legislative rule. Applying the PSC's decision prospectively to the succeeding calendar year provides some assurance to the Tax Commissioner and the Legislature that estimated revenue from the telecommunications tax for the succeeding calendar year will not be subject to substantial change. The Legislature can appropriate the estimated revenues with some assurance that its estimate will not be subject to substantial reduction half way through the fiscal year. As would have happened in this instance if the Petitioner were correct, it does not have to anticipate issuing

⁵ Some commodities or services are subject to competition from the beginning of the year until the end of the year. Others may not have been subject to competition at the beginning of the year, but became subject to competition at some point during the year. Still others may have been subject to competition at the beginning of the year, but ceased being subject to competition during the year. Regardless of what may have happened during the year, it is the facts in existence on the date of the determination that are important.

substantial refunds to taxpayers based on a determination occurring late in the calendar year. The issuance of substantial refunds to multiple taxpayers could substantially affect estimated and appropriated revenues in a deleterious manner.

In a similar vein, if the Petitioner's interpretation of the statute were used, a taxpayer would go through the entire tax year not knowing which of its commodities and services are taxable because they are not subject to competition, and which commodities and services are not taxable because they are subject to competition. A taxpayer would be unable to predictably order its business for any given calendar year because it would not know which commodities and services are taxable for a given tax year and which are not, until late in the year. In recent years, it appears that the commodities and services subject to competition have increased each year, thereby reducing the number of commodities and services subject to the tax. This has benefited taxpayers by presumably reducing their tax burden from one year to the next.⁶ However, if the commodities and services that are subject to competition decrease from one year to the next, the gross income from those commodities and services would become subject to the telecommunications tax, with a corresponding increase in the gross income subject to the tax. Thus, the taxpayer might have a substantially larger tax burden at the end of the year.

Regardless of the logic of the parties' respective positions, this Office is limited to determining whether the State Tax Commissioner's interpretation is based on a permissible construction of the statute. His interpretation does not have to be the "best" construction, or the one that serves the statute in the most logical manner. *Appalachian Power*, at 588, 466 S.E.2d at 439. It need not be the one that this Office might have adopted had it been in the State Tax Commissioner's position. *Id.* at 591, 466 S.E.2d at 442. The legislative rule need only be one

⁶ This presumes gross income from each commodity and service remains relatively stable from year to year.

that flows logically from the statute. *Id.* at 588, 466 S.E.2d at 439. As previously discussed, the Tax Commissioner’s interpretation, as promulgated in the legislative rule and approved by the Legislature, is one that flows logically from the statute. The Tax Commissioner did not act arbitrarily or capriciously in promulgating the rule, and did not exceed his constitutional or statutory authority. Thus, this Office must defer to the Tax Commissioner’s interpretation of the statute.

This Office is mindful of the admonition of the Supreme Court that:

“A statute, or administrative rule, may not, under the guise of “interpretation,” be modified, revised, amended or rewritten”. Syl. pt. 1, *Consumer Advocate Div’n v. Public Serv. Comm’n*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Syl. pt. 4, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002); Syl. pt. 3, *Syncor Int’l Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001). In this matter, however, this rule does not come into play. The statute is silent as to the issue of whether the Public Service Commission’s Order applies retroactively to the year in which it is issued, or whether it applies prospectively to the year immediately succeeding. On this issue, the statute is not clear and unambiguous. The Tax Commissioner’s legislative rule has not “modified, revised, amended or rewritten” the statute; it has addressed an issue on which the statute is silent and, consequently, is ambiguous. Thus, the legislative rule is valid and must be upheld.

The Petitioner also challenges the Tax Commissioner’s legislative rule on the grounds that it was approved by the Legislature as part of an omnibus rule bill, passed by the Legislature in 1988. See Acts of the Legislature, 2nd Reg. Sess., 1988, chapter 112. It maintains that the legislative rule is invalid because its passage as part of an omnibus rule bill violates the one-subject rule of the West Virginia Constitution, W. Va. Const. art VI, § 30. See *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

The Petitioner is correct that the Legislature approved W. Va. Code St. R. § 110-13B-2.6 as part of an omnibus rule bill. In fact, it was approved as part of the very omnibus rule bill that the Supreme Court considered in *Kincaid*. Consequently, the legislative rule is subject to the same analysis as conducted in *Kincaid*.

In *Kincaid*, having determined that the Legislature could not give wholesale approval to a series of unrelated legislative rules promulgated by a number of administrative agencies as part of an omnibus rule bill, the Supreme Court considered whether or not it would invalidate all rules that had been approved as part of such a bill. It was required to consider whether it would invalidate all of the rules approved in the omnibus rule bill, or whether it would apply its holding prospectively. Although the consideration was not one of prospective versus retroactive application, it recognized that the principles articulated in *Bradley v. Appalachian Power Co.* 163 W. Va. 332, 256 S.E.2d 879 (1979) were relevant to its decision. The Court determined that its decision in *Kincaid* would apply prospectively, relying primarily on the fourth factor articulated in *Bradley*:

Fourth, where, on the other hand substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored.

Syl. pt. 5, in part, *Bradley*. It reasoned that invalidating all of the rules passed as part of the 1988 omnibus rule bill and, by implication, all other legislative rules passed during other legislative sessions as part of omnibus rule bills would “invalidate hundreds of legislative rules which regulate many different subjects ranging from air pollution to jails. Our governmental agencies would be unable to carry out their functions.” 189 W. Va. at 416, 432 S.E.2d 86.

This tribunal is of the opinion that the analysis used by the Supreme Court applies in this matter. Invalidating the legislative rule in this matter would require invalidation of the entire

legislative rule respecting the telecommunications tax.⁷ Invalidating the rule would hamper the State Tax Commissioner's administration of the telecommunications tax, not only with respect to the specific issue raised in this matter, but with respect to all matters addressed by the legislative rules. Neither the State Tax Commissioner nor taxpayers subject to the telecommunications tax could be certain whether any portion of the legislative rule pertaining to the telecommunications tax could be relied upon by them. Thus, invalidation of the legislative rule would prevent the State Tax Commissioner from carrying out his function.

It appears that the Petitioner takes the position that invalidation of the State Tax Commissioner's interpretation, as embodied in the legislative rule, means that its interpretation of the statute must be valid. In essence, the Petitioner seems to presume that if the Tax Commissioner's rule is invalid, then the Petitioner must be correct.⁸ However, this is not the case. Instead, if the legislative rule were determined to be invalid, the parties and this tribunal would be left with an ambiguous statute. Under those circumstances, this Office would be required to interpret the statute based on application of the principles of statutory construction. The State Tax Commissioner's interpretation would be on an equal footing with the Petitioner's interpretation. This Office would have no duty to show any deference to the State Tax Commissioner's interpretation of the statute. This would tend to discount the administrative expertise of the State Tax Commissioner, in contravention of the rule that requires deference to the expertise of the administrative agency charged with administering a statutory scheme.

⁷ Although this tribunal is without authority to do so, it would apparently require invalidation of all other legislative rules promulgated by the State Tax Commissioner and approved by the Legislature pursuant to the 1988 omnibus rule bill, as well as all rules promulgated by other agencies and approved by the Legislature pursuant to that bill.

⁸ The Petitioner apparently bases this argument on the assumption that the statute is clear and unambiguous, in that the determination of the PSC is conclusive as to all matters set forth in its determination. The Petitioner apparently believes that this conclusive effect is to be given to all determinations made by the PSC, including those that are not delegated to the PSC by statute.

Invalidation of the legislative rule would not necessarily result in adoption of the Petitioner's interpretation of the statute.

The Supreme Court's holding in *Kincaid* required that its ruling in that matter be applied prospectively. Prospective application of that ruling can be viewed in two ways. The first is that ruling should apply only to legislative rules approved in omnibus rules bills passed by the Legislature subsequent to the decision. The second is that it should apply to all decisions subsequent to *Kincaid* that involve legislative rules approved as part of an omnibus rule bill. Given the concerns articulated by the Court in *Kincaid*, this Office is of the opinion that the former approach is the one that the Court intended and appears to have adopted in *Kincaid*.

Furthermore, this Office is of the opinion that the former approach is the better one. The latter approach would invalidate all legislative rules that were approved by the 1988 omnibus rule bill, except the one that was considered by the Court in *Kincaid*. This has the effect of validating one rule or set of rules that was unconstitutionally approved over all other rules that were subject to the very same unconstitutional approval. This defies logic and fundamental concepts of fairness. Also, as stated by the Court in *Kincaid*, it has a profound, negative effect on the ability of government agencies to carry out their functions, except for the one agency whose rule was considered in *Kincaid*, and then only to the extent of that one rule.

The former approach allows the legislative rules that were unconstitutionally approved to stand. This permits government agencies to perform functions pursuant to rules that they promulgated and which were approved in good faith, while serving as notice to the Legislature, administrative agencies and private parties with an interest in rules so promulgated and approved, as well as to the public at large, that future transgressions of this nature are likely to result in invalidation of rules so promulgated and approved.

This Office is also mindful of the decision of the West Virginia Supreme Court in *Winkler v. W. Va. School Bldg. Auth.*, 189 W. Va. 748, 434 S.E.2d 420 (1993), wherein the Court spoke to the effect of its decisions on the public where there has been reliance on past precedent. Therein, the Court stated:

In a number of cases, we have discussed whether the principles of a given opinion should be extended retroactively so as to be applicable to past events. In this case, we are aware that the SBA already has issued revenue bonds and that the funds from those bonds not only were used to complete new schools, but also, in a number of instances, as being used to fund construction already underway or authorized although not yet actually started.

It is apparent that voiding these bonds would bring considerable financial chaos to the State. Not only would it be damaging to the school system and the construction that is taking place, but it would place an enormous financial hardship on the State and ultimately the citizens as taxpayers.

Id. at 764, 434 S.E.2d 436.

The Court's holding in *Kincaid*, that the legislative rules approved in 1988 should be invalidated only prospectively because retroactive invalidation would interfere with the government's administration of the law, coupled with its holding in *Winkler*, that retroactive invalidation of a statute (or a legislative rule) should be avoided where it would cause financial chaos or substantial financial hardship to the State and its citizens, leads to the conclusion that the legislative rule in this matter, which was improperly approved by the Legislature, should not be invalidated given the circumstances of this matter.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the petitioner-taxpayer to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. W. Va. Code § 11-13B-2(5) [1987] is silent on the issue of the year to which the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition applies.

3. The legislative rule promulgated by the State Tax Commissioner to address the issue that was not addressed by W. Va. Code § 11-13B-2(5) [1987], specifically W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), is based on a permissible construction of the statute, and in promulgating the rule, the Tax Commissioner did not act arbitrarily or capriciously.

4. In accordance with the Tax Commissioner's legislative rule, W. Va. Code St. R. § 110-13B-2.6 (Apr. 4, 1988), the determination of the Public Service Commission respecting whether or not commodities and services are subject to competition, made pursuant to W. Va. Code § 11-13B-2(5) [1987], is applicable to the succeeding calendar year.

5. Approval of a legislative rule in an omnibus rule bill will not necessarily result in invalidation of the legislative rule when, to do so would, as here, result in the inability of government agencies to carry out their functions, and which could also result in substantial financial chaos or financial hardship to the State, which would have to be borne by the citizens as taxpayers.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund in the amount of \$____ of telecommunications tax, for calendar year 2004, is hereby **DENIED**.